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Supreme Court of the United States

OCTOBER TERM, 1945

No. 772

WILLIAM V. BICANIC, FRANK AKAR, GEORGE ELICH, CARL MOE, MARTIN WONSKI, MARTIN DYBEVICK AND NIKOLA GROSDANICH, in Behalf of Themselves and All Others Similarly Situated, Petitioners,

vs.

J. C. CAMPBELL COMPANY, a Corporation, Respondent.

No. 773

HARRY CZUPIY, STEVE GESWINE, WALTER L. CARLSON, JOSEPH SKALA, JR., JOHN STIMAC, JACOB MACIAG, AILI WAPOLA, ERICK HELLMAN, MAYNARD L. SCHNEIDER, ANDREW ALSZEWSKI, ALEX KANGAS, JOHN NESLAND, NIKOLA GROSDANICH, ELMER OSOFF, CHARLES A. MUELLER, JOSEPH SCHONE, VICTOR CARLSON, EDWARD ANDRESEN, CHARLES WAPOLA, CARL E. MANYBERG, DAVID McMILLEN, in Behalf of Themselves and All Others Similarly Situated, Petitioners,

vs.

NORTH STAR TIMBER COMPANY, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Opinions Below:

Bicanic, et al., v. J. C. Campbell Co., 19 N. W. (2d) 7 (May 25, 1945); 20 N. W. (2d) 885 (Oct. 22, 1945).

Czupiy, et al., v. North Star Timber Co., 19 N. W. (2d) 11 (May 25, 1945); 20 N. W. (2d) 489 (Oct. 22, 1945).

JURISDICTION

The petitioner makes no statement, as required by the rules as to jurisdiction. The question raised by the petition is purely factual. The judgment of the State Supreme Court was entered on October 25, 1945.

Petitioner apparently invokes jurisdiction under Section 237 (b) of the Judicial Code as amended.

QUESTIONS PRESENTED

1. There is no Federal question presented.
2. Under the law, must an employee be paid wages for "time" that he is permitted to remain at or near his place of work under no economic compulsion of any kind by his employers when he is free to come and go as he chooses and remains, or not, to suit his own convenience and is not subject to call in case of emergency?

SUMMARY STATEMENT OF THE CASE

These actions were commenced by the plaintiffs as representative suits to recover amounts claimed to be due them under Section 7 (a) of the Fair Labor Standards Act, in the District Court of the Eleventh Judicial District of St. Louis County, Minnesota. They were consolidated for trial and tried before the trial court sitting without a jury. After the trial Judge Fesler became ill, and subsequently the cases upon stipulation of the counsels were submitted to a new trial judge (Hon. Edward Freeman) who made findings of fact, conclusions of law and order for judgment for the defendants. The trial court found that all wages, including overtime due, had been paid.

There was an appeal in the consolidated case to the Supreme Court of Minnesota. That Court held the evidence in the record sustained the findings of the lower court and affirmed as it was bound to do.

See opinion, *Bicanic v. Campbell, supra.*

ARGUMENT

I. It is the contention of the respondent that there is no Federal question involved; that the petitioners do not specify by reference to the Record or otherwise, that any such question was ever raised in the State Supreme Court, and that petitioner has failed in every respect to show jurisdictional requirements.

II. The law does not require that an employee be paid wages for time that he is permitted to remain at or near his place of work under no economic compulsion of any kind by his employers when he is free to come and go as he chooses and remains, or not, to suit his own convenience, and is not subject to call in case of emergency.

Point 1—No Federal Question Involved.

A Minnesota contract for hire is involved and it is found as a fact that there was no contract to pay for time not spent on the job. See Contracts Involved, Record 2, Supp. pages 1, 12 and 17, and Record 2, page 368, folio 3; page 369, folios 1 and 2.

The case presents no Federal question because the facts do not create a right of action under the Federal Statutes. The Minnesota Court fully accepts the *Fair Labor Standards Act of 1938,* 52 Statutes at Large 1060-1069 (1938), 29 U. S. C. Secs. 201-209, and applies the same to the facts of the case, and the Court also accepts

the rules announced with reference to what constitutes working time in *Skidmore, et al., v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161, and *Armour & Co. v. Wantock, et al.* (1944), 323 U. S. 126.

The petition apparently invokes jurisdiction under Section 237 (b) of the Judicial Code as amended, which provides as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had, where is drawn in question the validity of a treaty or statute of the United States; * * *."

This section is the only authority for taking a case to the Federal Supreme Court, from the highest Court of the State and the right to review the decision of a State Court exists only in cases strictly within its own terms.

Caperton v. Ballard (Va., 1872), 14 Wall. 238, 241, 20 L. Ed. 885.

Seaborne Airline R. Co. v. Duvall (N. C., 1912), 225 U. S. 447, 32 S. Ct. 790, 56 L. Ed. 1171.

Roller v. Murray (W. Va., 1914), 234 U. S. 738, 34 S. Ct. 902, 58 L. Ed. 1570.

The petitioners have not pointed out "where is drawn in question the validity of a * * * statute of the United States." They have not attempted in any way to establish that a Federal question exists. Their Record and Brief are a complete blank on the question of jurisdiction and what they claim to be the Federal question involved.

It is also well settled that the Federal question must have been raised in the State Court:

> "The decisions of this Court not only have repeatedly held that a Federal right in order to be reviewable here must be set up and denied in the State Court, but have often held that such claims of denial is not properly brought to the attention of this Court where it appears that the State Court declined to pass upon the question because it was not raised in the Trial Court as required by the state practice."
>
> *Louisville, etc., R. Co. v. Woodford* (Ky., 1914), 234 U. S. 46, 34 S. Ct. 739, 58 L. Ed. 1202.

There is no evidence in the Record and the Brief does not attempt to show that a Federal question of any kind was raised in the State Supreme Court. Thus the petitioners never raised a Federal question at any time in the Court below, and limited their appeal to the State Supreme Court solely to a review of the facts. It does appear, however, that the State Supreme Court considered the rule announced in *Skidmore, et al., v. Swift & Co., supra,* and *Armour & Co. v. Wantock, et al., supra,* and applied the rule of those cases. Thus the Fair Labor Standards Act was applied by the lower court and by the State Supreme Court and the petitioners were held to be within its coverage and it was applied pursuant to the rule announced in *Skidmore v. Swift, supra,* and *Armour v. Wantock, supra.*

Neither have the petitioners in any way attempted to show that there has been a denial of Federal rights and it is well settled that there must be before certiorari can be granted.

> "The jurisdiction of the Court to review the proceedings of the State Courts, as we have had frequent occasion to declare, is not that of the general reviewing court in error but is *limited to the specific*

> *instances of denial of Federal rights* whether those pertaining to the constitutionalities of Federal or State statutes or to certain rights, immunities and privileges of Federal origin specifically set up in State Court and denied by rulings and judgment of that Court." (Emphasis supplied.)
>
> *Waters Pierce Oil Co. v. State of Texas* (Texas, 1909), 212 U. S. 86, 29 S. Ct. 220, 53 L. Ed. 417.

Petitioners fail to specify what Federal right, if any, has been denied them.

In *Yosemite Gold Mining & Milling Co. v. Emerson,* 208 U. S. 25, 52 L. Ed. 374, 28 S. Ct. 196, the Supreme Court of the State of California had reviewed the conflicting testimony of the trial court and the State Supreme Court said:

> "It was for the Trial Court to determine this conflict which is done by the finding in question, and its determination is conclusive upon this appeal."

The United States Supreme Court in passing on the appeal said:

> "In thus deciding, the Supreme Court of the state did not within the meaning of Section 709, rev. stat., decide any right of Federal origin adversely to the plaintiff in error. It simply held that there was a conflict of testimony in the record upon this subject, and that the conclusion of the court below upon this matter of fact was conclusive upon the Appellate Court. This does not amount to a denial of a Federal right, concerning which the plaintiff in error had especially set up his claim so as to give the right of review of the decision of the State Supreme Court in this court. *Dower v. Richards,* 151 U. S. 658, and cases therein cited."

The Yosemite case is exactly in point with the instant case because here we have exactly the same situation. The State Supreme Court held there was a conflict in

testimony in the Record upon this subject and the findings of fact by the Court below were conclusive upon the Appellate Court. *Bicanic v. Campbell, supra,* page 11. Even though there were an error of judgment of the State Court in misapplying the law, it would not justify granting of a writ in the instant case.

> "A mere error of judgment by the state court, in misapplying the law or adjudging the facts but adjudging nothing obnoxious to the Constitution, treaties or laws of the United States, does not make its judgment reviewable, unless the error is so gross and the decision so arbitrary or fraudulent as to deny due process of law or the equal protection of the laws."
>
> *Cyclopedia of Federal Procedure,* 2nd Ed., Vol. 10, Sec. 4991, Footnotes 22 and 23.

We submit the petitioners have failed to show there is a Federal question involved and if one exists that it is substantial *(Zacht v. King,* 260 U. S. 174, 176, 177); that a Federal question was ever raised in the State Supreme Court; that a Federal question was ever passed on by the State Court, and petitioners have failed to specify by reference to the Record where such Federal question, if any, appears.

Thus the petitioners have failed in every respect to meet the requirements of Section 237 (b), Judicial Code, as amended and has failed to meet every requirement of Rule 2 of this Court.

POINT 2.

The second question raised is whether employees must be paid under the *Fair Labor Standards Act of 1938, supra,* for "time" or hours that they are not required to work and are under no economic compulsion of any kind by the employer, are not on call, are free to leave the

premises at will or remain there if they see fit, and are not subject to rebuke or criticism if they are not available in case of emergency.

Summary of Argument.

The employees are cooks, cookees and bullcooks in lumber camps. They lived at the camp; it was their home. They started to work at about 4:00 or 5:00 o'clock in the morning and worked until 1:00 or 1:30 o'clock in the afternoon. They were then free from two to two and one-half hours to do as they pleased. During this period they could sleep (R2, p. 322, f. 3 and following), they were free to do as they pleased (R2, p. 286, ff. 1, 2, 3), they could leave the camp and could go any place they wanted to during that period, they could take a ride, go to town, or go hunting and fishing (R2, pp. 324, 325, 331), they could leave the camp without permission (R1, p. 42, ff. 1, 2). During the time off they

> "were not required to be on duty or on call and could not be subject to rebuke or criticism if they were not available in case some emergency arose" (R2, p. 369).

It is respondents' contention that time spent by an employee under the factual situation shown above is not time worked within the terms of the Fair Labor Standards Act or under the rule announced by the United States Supreme Court in *Skidmore v. Swift, supra; Armour v. Wantock, supra,* and *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123,* 321 U. S. 590.

ARGUMENT

As the question "of time not worked" is the only one involved, we set forth in our argument references to pertinent facts and findings to assist the Court in determining whether such "off time" constitutes time worked, for as the Court has stated in *Skidmore, et al., v. Swift & Co.*, 323 U. S. 124, 65 S. Ct. 161:

> "This involves scrutiny and construction of agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time and all of the facts surrounding the circumstances."

Prior to the passage of the Fair Labor Standards Act all employees of the timber industry were on a monthly wage basis, and any control over the hours and wages was such as was provided by a union contract with the Timber Workers Union, Local 29. When the Act became effective, the extent of the coverage clause as to commerce and "production of goods for commerce" was not clear. When the union negotiated a new contract in July, 1939, all employees, including the cooks, cookees and bullcooks were kept on a monthly rate (Supp. R2, Exhibit A, p. 7).*

In May, 1941, an hourly rate was negotiated for general woods work, but the cooks were left on a monthly rate until a ruling was received from the administrator of the Wage and Hour Law (R2, p. 228, f. 3). (All reference hereafter to cooks will be deemed to also include cookees and bullcooks.) This ruling was finally received in June, 1941, and thereafter a schedule for cooks was negotiated and included in the union contract for that year (Supp.

*In this brief the records or supplemental records in the North Star case will be referred to as "R1" and in the Campbell case as "R2" and "Supp. R2."

R2, Ex. A, pp. 7 and 8). This breakdown from a monthly rate to an hourly rate was made in order to facilitate bookkeeping in the camps and to set up a schedule of hours of work for the cooks and others.

This schedule was in the process of negotiation for several weeks between the union and the Timber Producers Association who acted as a bargaining agent for the various producers. Various facts were taken into consideration by the parties in making up the schedule. They took into consideration the amount the employees earned before and the amount of work which they had to do (R2, p. 245, f. 3), and the amount of work each had to do in comparison with a cook in a larger camp, and in some instances to give the men more money, they waived the seasonal exemption (R2, p. 246, f. 1). That is, they paid overtime after 40 hours instead of 56 hours, the latter being the minimum hours permissible under the seasonal exemptions. The schedule provided in the three top classifications for a waiver of the seasonal exemption (R2, p. 7, f. 1). Whenever the parties in their negotiations thought the men could not do the work within the time set up in the schedule, additional help was provided for them and the cook would be given another cookee or bullcook (R2, p. 231, f. 3, and p. 232, f. 1). This additional help was given because the union claimed it was needed so the men could comply with the hours set up in the schedule (R2, p. 232, f. 1). The new schedule was also based on the fact that the old monthly rates took into consideration the amount of work which the employees had to do (R2, p. 245, f. 3, and p. 257, f. 1). "Their whole work was taken into consideration" (R2, p. 256, f. 1), and that past experience was taken into consideration (R2, p. 270, f. 1).

The cooks' schedule has been re-negotiated from year to year by the parties to the union contract since 1941.

After the schedule was set up, the operators treated the hours to be made available practically as a guaranteed work week. The manner in which the schedule was applied was to limit the employees to the number of hours set up in the schedule and then to require them to do the work in that period, but if they could not perform the work in that period, *they were paid additional overtime,* or whenever the employee stated to the employer that they could not perform their work within the hours scheduled, then they were elevated into the next higher bracket. That is, if a cookee was working a 63-hour week and complained of the fact that he could not do his work in that number of hours, then the employer stepped him up into the next bracket and gave him 68 hours even though he only worked 65.

The record is full of testimony that additional overtime was paid when the employees worked over the schedule or they were stepped into the next bracket.

(R2, pp. 92-93; p. 202, ff. 1, 2; p. 315, f. 3; p. 239; p. 247, f. 1; p. 251, f. 1.)

(R1, pp. 35 to 38, incl.)

(R1, p. 44, f. 2; p. 46, f. 1; p. 64, ff. 1, 2; p. 217, f. 1; p. 215, f. 3.)

(R1, p. 102, ff. 1, 2; p. 103, ff. 2, 3; p. 109, f. 3, and pp. 110, 112 and 113.)

(R1, p. 122, ff. 2, 3; p. 123.)

(R1, p. 134, f. 3; pp. 232-233.)

Dozens of specific cases of overtime which were shown on time cards are set up in Exhibit No. 41, a few of which are set up in R1, pp. 306-307-308-309.

After the schedule was set up by the agreement of the

parties, the employees were given notice of the schedule and its contents by various means. The Midwest Labor, the union's official publication, carried the schedule in its paper (Supp. R2, pp. 18-19-20-21). The Campbell Company sent out notices and requested employees to sign them such as Def. Exhibit 3, Supp. R2, p. 24. The North Star Company posted in all its cook camps large signs 10¾" by 13¾" which notified employees they must obtain written permission before working hours over the schedule (R1, p. 282, Def. Ex. 3). Practically every employee admitted knowledge of the schedule and its limitations through one means or another (R2, p. 81, f. 2; p. 130, f. 2; p. 189, f. 1; p. 201, f. 1) (R1, p. 65, f. 2; p. 121, ff. 1, 2).

Some of the employees admitted that they knew that if they worked any hours over the schedule they would be paid additional for such work—but they never kept track of the hours or made any claim for over hours (R2, pp. 90, 91, 103, 104, 131, f. 1). Counsel for petitioners admitted that other employees had knowledge of the schedule (R1, p. 133, f. 2), and that the signs (North Star Ex. 3) were posted and they had no evidence to deny that they were posted.

The union contract provided for a grievance and arbitration clause and yet never once did the union file a grievance regarding hours nor demand arbitration.

The North Star set up a system of overtime. It had small books printed containing authorization slips (R1, p. 220, f. 3, Def. Ex. 40). These were sent out to camp and any employee who had to work over the schedule was issued an authorization slip. This system applied to all employees, cooks, production and other hourly employees (R1, p. 221). This was to follow up the

rule stated in the sign, Defendant's Exhibit No. 3. This plan was later modified because they had so many over hours in excess of the schedules "they couldn't be signing slips all the time." Thereafter, permission was granted orally, or cooks were boosted into the next bracket (R1, p. 223, f. 3). The limitation on employees other than cooks was the weekly hours set up in the union contract (Supp. R2, p. 6, f. 2).

Hours worked is the sole issue in these cases, and most of the evidence centers around whether cooks took time off during the day. Petitioners' testimony generally was to the effect that cooks worked from 4:00-4:30 A. M. to 6:00 or 7:00 P. M. with no time off except for meals, and that they were on duty all the time and could not leave the camp and were subject to call at all times.

The custom and practice in the woods is for cooks and like employees to take time off usually in the middle of the afternoon. John Harvey (R2, p. 330, ff. 1, 2). Hjalmer Helmerson (R2, p. 333, f. 3; p. 339, f. 2). Harry Gearhart (R2, p. 350, f. 2). Thomson (R1, p. 257, ff. 1, 2).

The cooks, etc., did take time off. Wonsky undressed and went to bed (R2, p. 240, ff. 2, 3; p. 275, f. 3, and p. 318, f. 1). Fred Alexander, a witness for the respondents and a cook of many years' experience, testified he always had time to spare and took time off from 2:00 o'clock to 4:30 P. M. (R2, p. 284, f. 1; p. 287, f. 2.)

C. W. McKusick testified (R2, p. 290, f. 3) that Wonsky took time off (R2, p. 291, f. 1; p. 292, f. 1), and Grosdanich quit because there was not enough work to keep him busy (R2, p. 293, f. 2).

McGugin also testified Wonsky took time off (R2, p. 309, ff. 2, 3; p. 310, f. 1), and Carl Moe did also (R2, p. 316, ff. 1, 2; p. 327, f. 2).

If they took time off in the past, they continued to do so (R1, p. 32, f. 2). They usually took time off in the afternoon (R1, p. 34, ff. 1, 2), and of course all of them took time off for meals.

Rest period was 1:30 to 3:30 (R1, p. 233, f. 3, and following) (R2, p. 263, ff. 1, 2).

This time off was considered a rest period and during that time cooks were not disturbed (R2, p. 322, f. 3, and following).

During the time they had off they could sleep. It was their rest period. They were not disturbed, and were not expected to be around at that time (reference above). They were free to do as they pleased when they took time off (R2, p. 286, ff. 1, 2, 3). They could leave the camp and could go any place they wanted to during that time. They could go fishing if they wished (R2, p. 324), could go hunting, or go to town, and if they did, no one would bother them (R2, p. 325, f. 1). They could take a ride. They were not on duty (R2, p. 331, ff. 1, 2). They were at liberty to leave the camp during off hours (R1, p. 30, f. 2; p. 41, ff. 2, 3). They could leave camp. Didn't have to be in camp and could leave without permission, and they were off duty (R1, p. 42, ff. 1, 2).

They could stay in their shacks or bunkhouses; they could go out for a walk, and they were not required to stay on duty (R1, p. 234, f. 1). The cook house was deserted, the fires were out (R1, p. 239, f. 2), and the cookees were fishing (f. 2), and at a roadside tavern (R1, p. 254; p. 255; p. 261; p. 273).

The cooks kept a record of their own hours. Both companies had cards so they could keep track of their hours. These cards were furnished by the Timber Producers Association and were all alike. The card provided for the

hours each day and the total for the week, and a certificate as follows:

"I certify the above as a time record of hours worked and work performed daily during week beginning..... and ending....." (R1, p. 283, Def. Ex. 4). The employees kept their own time. They got a new card at the beginning of the week and filled out the card, signed it and returned it at the end of the week (R1, p. 27, f. 2).

The cook is the boss of the cook camp and the work performed by the cookees and bullcooks (R1, p. 29, ff. 1, 2), and could thereby regulate the time for the job (f. 3).

The time cards show hours were allowed over the regular schedule hours as to cook camp employees and other employees, North Star Defendant's Exhibit 41 (R1, p. 306).

All time cards shown in Exhibit 41 on pages 306, 307, 308 and 309 show hours worked and paid for over schedule or contract hours. The printed exhibit only shows a few of the hundreds of time cards that are a part of North Star Defendant's Exhibit 41, but they all show substantially the same facts.

After the employees had signed their time cards, knowing they were to be used for payroll purposes, they all received payroll accounts showing the regular hours, overtime hours and deductions. They received these, accepted them and cashed the check attached. North Star Defendant's Exhibit 1 is a typical payroll account (R1, p. 281) and J. C. Campbell Defendant's Exhibit 4 (Supp. R2, p. 25).

In many instances no additional hours were ever claimed and no claim was made until the suit was started

(R2, p. 92, ff. 1, 2; p. 93, f. 2; p. 138, f. 1; p. 192, f. 1; p. 313, f. 2).

The petitioners claimed below that the employees worked 14 hours a day. Respondents claimed that the employees took off from two to two and one-half hours each day, thereby making it an 11½ to a 12 hour day, and in the brackets other than cooks the schedule was less. Thus the issue became one of whether or not the employees were working 11½ to 12 hours a day, or 14 hours per day by including the so-called rest periods from 1:00 or 1:30 to 4:00 or 4:30 in the afternoon, as time worked.

Findings of the trial court below on this issue are very specific.

> "7. That during all of the time these various plaintiffs worked for the defendant they were working under a contract between the employer and the union to which they belonged, which provided the rate of pay that they should receive per hour and the number of hours available to them to work. That the terms of the contract were known to all of the plaintiffs. That they were paid on the basis of the hours available, both straight time and overtime, and the rate of wages fixed in the contract was not in any case below the minimum to be paid according to the provisions of the Fair Labor Standards Act.
>
> "That except in rare instances they were able to perform their work in the hours available. That in all instances where they were unable to do their work in the hours available and brought that fact to the attention of the defendant, they were allowed additional hours to take care of the extra time put in. That a period of two or more hours each day was available to the cooks, during which time they could do as they pleased and were not required to be on duty or on call and could not be subject to rebuke or criticism if they were not available in case some emergency arose. That longer periods of time were available to the cookees and bullcooks when

they were on their own and could do as they pleased without fear of just criticism or rebuke" (R2, p. 368, and following; R1, p. 314, and following).

The trial court thus found the facts in favor of the respondents, and therefore on the Record they have worked 11½ hours to 12 hours per day, for which they have been fully paid, as required by the Fair Labor Standards Act.

The Minnesota Supreme Court stated the issue as follows:

> "Here the trial court found that plaintiffs had not worked any hours in excess of those for which they had been fully paid, and specifically determined that plaintiffs enjoyed each day certain free or waiting time when they were not on duty and not subject to call. Are these findings sustained by the evidence?"
>
> *Bicanic v. Campbell, supra,* p. 10.

The Court then states the applicable rule of law:

> "The findings of fact of a trial court are entitled to the same weight as the verdict of a jury and will not be reversed on appeal unless they are palpably contrary to the evidence. *Bank v. International Sisal Co.,* 212 Minn. 135, 4 N. W. (2d) 113, 141 A. L. R. 657; *Schultz v. Brennan,* 195 Minn. 301, 262 N. W. 877; 1 Dunnell Digest & Supp., Sec. 411."
>
> "The same rule applies here where the findings were made by a judge other than the one who presided at the trial. *Wunder v. Turner,* 120 Minn. 13, 138 N. W. 770."
>
> "As a court of review, it is not for us to usurp the function of the trial court by attempting to weigh the evidence as if trying the matter de novo *(Rebne v. Rebne,* 216 Minn. 379, 13 N. W. (2d) 18) or by attempting to determine the weight and credit to be given the testimony of witness when such testimony is in conflict. *Exrieder v. O'Keefe,* 143 Minn. 278, 173 N. W. 434."

The Court then states, there is ample evidence to support the findings made, and they must be sustained even though this Court might be inclined to draw contrary inferences from the evidence and come to a contrary conclusion. *(Bicanic v. Campbell, supra,* p. 11.)

The Federal Rule is succinctly stated by Mr. Justice Black in *N. L. R. B. v. Waterman S. S. Corp.,* 309 U. S. 206-208 (1940), 49 S. Ct. Rep. 317, 84 L. Ed. 704, 706.

> "We do not ordinarily grant certiorari to review judgments based solely on questions of fact."

See also *Southern Power Co. v. North Carolina Pub. Serv. Co.,* 263 U. S. 508, 33 S. Ct. Rep. 164.

The Federal Rule as it has been applied in the leading case on time worked under the Fair Labor Standards Act is stated by the Fifth Circuit in *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123,* 135 F. (2d) 320 (C. C. A. 5, 1944) (321 U. S. 590) (modifying and affirming 40 Fed. Supp. 4), where the Court said:

> "Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. * * * What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact.
>
> "Upon reviewing the judgment as to the facts, an appellate court looks first to the findings of the court below, and then to the evidence in the record to ascertain whether or not those findings are clearly erroneous. The character of the controversy and the issue to be determined are the same as if this were merely an action by an employee for damages under Section 7 of the Act, viz.: How many hours constituted his workweek or how long did his employer suffer or permit him to work? In its ultimate aspect this is a dispute over wages, only one element of which is in controversy, the working time, which

is a factual quantity of wages just as the regular rate is a factual element of wages. These two factors multiplied together form the product that indicates the compensation.

"The record in this case presents no substantial question of law except whether or not the finding of the District Court as to working time was clearly erroneous. This depends upon whether the inference, which was the basis of the finding, was a reasonable one.

"The working time of every miner is a definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. It is a fact that cannot be found in any statute or decision or law book * * * but must be determined by the court or jury in any justiciable controversy wherein a real issue arises with respect thereto."

The Supreme Court stated the same rule with reference to time worked in *Skidmore, et al., v. Swift & Co.*, 323 U. S. 134, 65 S. Ct. 161:

"Whether in a concrete case such times fall within or without the Act, is a question of fact to be solved by the appropriate findings of the Court. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572. This involves scrutiny and construction of agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time and all of the facts surrounding the circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and not as a part of its compensation. The law does not impose an arrangement upon the parties; it imposes upon the Courts the task of finding out what the arrangement was."

See also *Armour v. Wantock*, 323 U. S. 126.

Petitioners' first specification of error restates the "off time" issue in terms of whether or not the employees were suffered or permitted to work more than twelve hours. Regardless of how it is stated, the question at issue remains whether "off time" constitutes working time. As to that the trial court found:

> "That except in rare instances they were able to perform their work in the hours available. That in all instances where they were unable to do their work in the hours available and brought that fact to the attention of the defendant, they were allowed additional hours to take care of the extra time put in. That a period of two or more hours each day was available to the cooks, during which time they could do as they pleased and were not required to be on duty or on call and could not be subject to rebuke or criticism if they were not available in case some emergency arose. That longer periods of time were available to the cookees and bullcooks when they were on their own and could do as they pleased without fear of just criticism or rebuke" (R2, p. 368, f. 3).

It is quite apparent from the findings of the trial court that it did not base its decision on whether the work could be done in twelve hours, but *it found in most cases the work was done in twelve hours,* that is, in the hours available; that *if it could not be done in that time,* the *employees were allowed additional hours to take care of the extra time.* Thus the employees had time off for two hours a day and during that time none of the indicia of working time was present, that is, they were not required to be on duty or on call such as in *Armour & Co. v. Wantock, et al.* (1944), 323 U. S. 126, and *Skidmore v. Swift & Company* (1944), 323 U. S. 134. They were not even required to be available in case of any emergency and they could do what they pleased without fear of just

criticism or rebuke; in fact the testimony is replete with situations where the employees left the premises, went fishing, went to taverns and engaged in other forms of recreation during this period, leaving the premises at their will and coming and going as they pleased during this off time (R2, pp. 324, 325, 326).

The State Supreme Court reviewed the findings of fact of the trial court. It said:

> "Where the trial court in its Findings in clear and explicit language found that plaintiffs enjoyed two or more free hours each day when they were not on duty nor subject to call, which free time they could do exactly as they pleased without fear of criticism or rebuke; we observe in passing, however, that reading of both the Findings and Memorandum as a unit indicates that Judge Freeman had in mind the correct rule and applied it in arriving at his decision."
>
> *Bicanic v. J. C. Campbell, supra,* p. 9.

Petitioner states in his argument that:

> "Contrary to the view of the Trial Court and the Minnesota Supreme Court, the mere fact that the contract between the petitioners' collective bargaining representative and each respondent defined the hours 'available' as 12 does not prevent compensation for the additional two hours where such 2 hours were in fact worked."

We are at a loss to know where the petitioner derives the basis for such an argument. There is absolutely nothing in the Minnesota Supreme Court's decision or in the findings of the trial court to substantiate such a claim. Nowhere in the findings of fact of the lower court does it rely upon the hours available set up in the contract as the hours worked, but it finds as a fact, as above set forth, that the employees worked only twelve hours

a day. Through the whole case is the question of time off and whether or not such hours should be paid for. As pointed out, the time off in this case lacks all the indicia of work under the Armour case and the Skidmore case, and it also lacks the indicia of work upon which the Court found that the miners were entitled to pay for travel time in *Tennessee Coal, Iron & Railroad Company v. Muscoda Local No. 123,* 321 U. S. 590. In that case there was continuous physical and mental exertion, as well as hazards to life and limb, the travel time was compulsory and occurred entirely on petitioner's property; the employees were at all times under the strict control and supervision of the employer, and the travel time was spent for the benefit of the employer and was not primarily undertaken for the convenience of the miners, and bore no relation whatever to their needs or to the distance between their homes and the mines.

In the instant case, during the time off there was no physical and mental exertion, no hazards to life, no supervision or control of any kind by the employer, and the time spent resting or at taverns or fishing or in other recreation was entirely for the benefit and relaxation of the employees.

The petitioners state in their brief (p. 10):

> "That the parties have contracted to regard the monthly rate as the total amount to be paid regardless of the actual number of hours worked";

but, as will be noted, no reference is made to the Record to support this contention, nor do the findings of the lower court or the decision of the State Supreme Court sustain petitioners' argument. Such claim or argument has no basis in the Record.

Here also, for the first time, petitioners claim that the rate of pay when reduced by contract from a monthly to

an hourly rate was fictitious and was arbitrary under the rule of *Walling v. Helmerich & Payne,* 323 U. S. 37; *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U. S. 419, and *Walling v. Harnishfeger Corp.,* 325 U. S. 427. The counsel neither in its petition nor argument makes any reference to evidence or to the contracts themselves which would justify his claim that the hours available were wholly arbitrary in character. As a matter of fact, wage schedules in the contracts (see R2 Supp., pp. 15, 16, 17, 18, 19, 20) show that when the monthly rate was reduced to an hourly rate, provisions were made for the payment of overtime and *that the reduction from a monthly to an hourly base was made strictly in accordance with the formula set forth by the administrator of the Wage and Hour Division in its interpretative bulletins.*

However, this issue is raised here for the first time; it was never raised in the lower court nor in the State Supreme Court. Accordingly, the question cannot be raised now, for it is well settled law that the

> "federal question must have been raised or drawn in question in the State Courts. It is not enough that it might have been raised or discussed by the Supreme Court in its opinion."
>
> *Cyclopedia of Fed. Procedure,* 2nd Edition, Vol. 10, Sec. 4980.
>
> See also *Southern Wis. Bell Telephone Co. v. State of Oklahoma* (Okl., 1938), 58 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751.

Petitioners also claim error on the part of the trial court

> "with respect to the assumption that unless there were a specific authorization or requirement for working the period in dispute, no compensation is recoverable therefor under the statute. This, of course, is not the law."

We agree with counsel that this is not the law; neither is it the fact, because the trial court never made such an assumption and petitioners do not and cannot point out the specific finding of the trial court wherein they claim such error was made, because there was no such assumption. On the contrary, the trial court stated in paragraph 7 of the findings above quoted that a contract did exist, that the hours available were set forth in the contract, the terms of it were known to all of the plaintiffs, and that they were paid on the basis of the hours available, and immediately thereafter and in the same paragraph of the same finding the trial court went on to say:

> "That in all instances where they were unable to do their work in the hours available and brought that fact to the attention of the defendant, they were allowed additional hours to take care of the extra time put in."

As specification number three, petitioners claim that the trial court found that petitioners had waived their claims for overtime where they failed to bring that fact to the attention of the defendant. All that the petitioners cite in support of this contention is a statement in the trial court's findings that the terms of the contract were known to all of the petitioners. From this bare statement, removed entirely from its context in the paragraph, petitioners make the audacious assumption that the trial court found that the employees waived their claim to overtime. The assumption is so absurd that we do not burden the Court with argument thereon. All the Court did was to make a specific finding of fact to the effect that these employees had been paid for all hours worked.

Further, the petitioners did not raise the question of waiver in the State Supreme Court and, therefore, it was

never passed on by that Court, and if it was an error on the part of the trial court, it was never urged as a basis for review in the reviewing court.

Petitioners also claim that:

> "It may not be denied that both courts below refused liability upon the theory either that their labor organization had waived petitioners' rights or that petitioners themselves had waived such rights by a failure to make a timely claim."

This claim is not only denied, but it is challenged as a completely erroneous statement which petitioners fail to substantiate either by reference to the Record, findings of the trial court, decision of the Minnesota Supreme Court, or by argument.

Specifications of error Nos. 4 and 5—we presume that petitioners here are urging upon the Court that the rule of the *Armour* and *Skidmore* cases *(supra),* should be applicable to the instant case in so far as time worked is concerned. An analysis of these two cases hereafter will show that the rule there announced is not applicable to the instant case.

Specification of error No. 6—petitioners claim error in disregarding the statement made by the trial court:

> "It seems to me the question resolves itself largely into whether or not men should be paid for time on the job during which it was not necessary for them to do any work * * *."

This is a miscellaneous statement from the trial court's memorandum which was attached to the findings. Petitioners have taken it out of its context, and when read in connection with its context it does not mean that the employees were working at that time; it simply means that they were on the premises. In the findings of fact quoted above, the Court has specifically found that the

employees were not on the job, that they did not have to work, that they were free to do as they pleased and therefore were not working. Counsel attempts to take a miscellaneous sentence out of the trial court's memorandum and out of its context and to infer that the Court made a finding that they were on the job. This is not the fact and this was recognized by the reviewing court when it said:

> "Plaintiffs assert that the trial court, by the memorandum accompanying its findings, indicated that it had applied the wrong test in making its decision by assuming that plaintiffs were entitled to pay merely for hours spent in actual work and not for the additional hours when the plaintiffs, although not actually working, were required to be on the job and subject to call. Regardless of the interpretation placed on the language of the trial court's memorandum, it is well established by prior decisions of this court that a memorandum of a trial judge attached to his findings or order, even though expressly made a part of such findings or order, may not be used to impeach, contradict, overturn, or modify the positive and unambiguous terms of such findings or order. Here, the trial court in its findings in clear and explicit language found that plaintiffs enjoyed two or more free hours each day when they were not on duty and not subject to call, which free time they could utilize as they pleased without fear of criticism or rebuke. We observe in passing, however, that a reading of both the findings and the memorandum, as a unit, indicates that Judge Freeman had in mind the correct rule and applied it in arriving at his decision."
>
> *Bicanic v. Campbell, et al., supra,* p. 9.

Specification of error No. 7—petitioners claim:

> "Error in refusing to take into consideration that the trial court was in fact a court of review."

Under this specification petitioners attempt to raise an issue which was raised in the State Supreme Court and which was decided against them on the basis of applicable rule of law of the state of Minnesota. This argument is bottomed on the fact that when the case was tried, the Hon. Bert Fesler, judge of the District Court, presided, and he was taken ill before findings were made. The parties stipulated before Martin Hughes, senior judge of the district, that the testimony taken before Judge Fesler should be submitted to the Hon. Edward Freeman upon the Record made, who would then be authorized to make findings of fact, conclusions of law and order for judgment. On the basis of this stipulation Judge Freeman made the findings of fact referred to herein. The State Supreme Court in passing on this contention of petitioners below said:

> "The same rule applies here, where the findings were made by a judge other than the one who presided at the trial. *Wunder v. Turner,* 120 Minn. 13, 138 N. W. 770. Although the trial court in making the findings did not have the witnesses before him, the same weight must be given to such findings as if based on testimony given by witnesses orally in his presence. *State Bank v. Walter,* 167 Minn. 37, 208 N. W. 423. See *Freeburg v. Honemann,* 126 Minn. 52, 57, 147 N. W. 827, 829, and *Sommers v. City of St. Paul,* 183 Minn. 545, 237 N. W. 427."
>
> *Bicanic v. Campbell, supra,* p. 10.

We submit that there is no Federal question raised here. It is purely a question of local practice, and the Minnesota Court has adopted a just solution for a practical problem.

The following review of wage-hour cases on time worked show that there is no Federal question involved in this case, and that the correct rule of law was applied in the courts below.

In *Armour v. Wantock,* 323 U. S. 126, 89 L. Ed. (Adv. 120) (1944) (C. C. A. 7), 140 F. (2d) 356, 8 Labor Cases, p. 51, 184 (152 A. L. R. 1037n), the action was brought under the Fair Labor Standards Act.

Armour & Company operates a soap factory in Chicago which produces goods for interstate commerce. It maintains a private fire-fighting force to supplement that provided by the city. The respondents were employed as fire fighters only, and otherwise had nothing to do with the production of goods. They were not night watchmen, a separate force being maintained for that purpose. They were not given access to the factory premises at night except by call or permission of the watchmen.

These men worked in shifts which began at 8:00 A. M., when they punched a time clock. The following nine hours, with a half hour off for lunch, they worked at inspecting, cleaning, and keeping in order the company's fire-fighting apparatus, which included fire engines, hose, pumps, water barrels and buckets, extinguishers, and a sprinkler system. At 5:00 P. M. they "punched out" on the time clock. They remained on call in the fire hall, provided by the company and located on its property, until the following morning at 8:00. They went off duty entirely for the next twenty-four hours and then resumed work as described.

During this nighttime on duty they were required to stay in the fire hall, to respond to any alarms, to make any temporary repairs of fire apparatus, and take care of the sprinkler system if defective or set off by mischance. The time spent in these tasks was recorded and amounted on average to less than a half hour a week. The employer did not deny that time actually so spent should be compensated in accordance with the act.

The litigation concerned the time during which these men were required to be on the employer's premises, to some extent amenable to the employer's discipline, subject to call, but not engaged in any specific work. The company provided cooking equipment, beds, radios, and facilities for cards and amusements and the men slept, ate, or entertained themselves pretty much as they chose. They were not, however, at liberty to leave the premises except that, by permission of the watchman, they might go to a nearby restaurant for their evening meal.

A single fixed weekly wage was paid to the men, regardless of the variation in hours per week spent on regular or on fire house duty, the schedule of shifts occasioning considerable variation in weekly time.

The fire fighting service was not maintained at the instance of the company's officials in charge of production, but at that of its insurance department. Several other plants of Armour and those of numerous other manufacturers in the same industry produce similar goods for commerce without maintaining such a fire-fighting service.

The lower court held that the usual hours for sleeping and eating would not be counted as hours worked, but the remaining hours should be. Mr. Justice Jackson delivered the opinion of this Court and with reference to whether or not time spent in amusement or idleness constituted hours worked the Court held (323 U. S. 126, 132):

> "The overtime provisions of the Act * * * apply only to those who are 'employees' and to 'employment' in excess of the specified hours; Sec. 3 * * * provides that 'employ' includes to suffer or permit to work.
>
> "Here, too, the employer interprets former opinions of the Court as limitations on the Act. It cites

statements that the congressional intent was 'to guarantee either regular or overtime compensation for all *actual work* or employment' and that 'Congress here was referring to work or employment * * * as those words are commonly used—*as meaning physical or mental exertion* (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business' (italics supplied). *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123,* 321 U. S. 590, 597, 598, 88 L. Ed. (Adv. 610, 614, 615), 64 S. Ct. 698, 152 A. L. R. 1014. It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading. The context of the language cited from the Tennessee Coal, Iron & R. Co. Case should be sufficient to indicate that the quoted phrases were not intended as a limitation on the Act, and have no necessary application to other states of facts.

"Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

"That inactive duty may be duty nonetheless is not a new principle invented for application to this Act. In *Missouri, K. & T. R. Co. v. United States,* 231 U. S. 112, 119, 58 L. ed. 144, 147, 34 S. Ct. 26, the

Court held that inactive time was to be counted in applying a federal Act prohibiting the keeping of employees on duty for more than sixteen consecutive hours. Referring to certain delays, this Court said, 'In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were nonetheless on duty when inactive. Their duty was to stand and wait.'

"We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging heavy on the employees' hands and because the employer and employee cooperated in trying to make the confinement and idleness incident to it more tolerable. Certainly they were competent to agree, expressly or by implication, that an employee could resort to amusements provided by the employer without a violation of his agreement or a departure from his duty. Both courts below having concurred in finding that under the circumstances and the arrangements between the parties the time so spent was working time, we therefore affirm."

The second case relied upon by appellant is *Skidmore v. Swift, supra.*

Seven employees of the Swift & Company packing plant at Fort Worth, Texas, brought an action to recover overtime, liquidated damages and attorneys' fees under the Fair Labor Standards Act. The employees were employed during daytime hours, all of which was considered working time. Two employees were engaged in general fire hall duties and maintenance of fire fighting equipment of the Swift plant. Others operated elevators. They were all paid weekly salaries.

Under an oral agreement of employment the employees undertook to stay in the fire hall on the company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were paid in addition to their weekly salary, an hourly base of 50¢ and later at 64¢. The company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table and a radio. The men used their time in sleep or amusement as they saw fit, except they were required to stay in or close by the fire hall and be ready to respond to alarms. It was stipulated that:

> "They agreed to remain in the fire hall and stay in it or within hailing distance, subject to call in event of fire or other casualty, but were not required to perform any specific tasks during these periods of times, except in answering alarms."

The trial court found the evidentiary facts as stipulated, but it made no findings of fact as such, as to whether under the arrangement of the parties and the circumstances of the case, which in some respects differ from those of the *Armour* case, the fire hall duty or any part thereof constituted working time. The trial court said, as a conclusion of law:

> "The time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the administrator and the courts."
>
> *Skidmore v. Swift,* 53 F. Supp. 1020.

The case thereafter went to the Circuit Court of Appeals for the Fifth Circuit, 136 F. (2d) 112, without a finding of fact as to whether the time spent in fire hall duty constituted working time, but with only a conclusion of law with reference to such acts. The Circuit Court affirmed the trial court. Certiorari was granted by the United States Supreme Court. The opinion was delivered by Mr. Justice Jackson (U. S., p. 136):

> "For reasons set forth in the Armour case decided herewith we hold that no principle of law found either in the statute or in court decisions precludes waiting time from also being working time. We have not, and cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. *Walling v. Jacksonville Paper Company,* 317 U. S. 564, 572. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.
>
> "We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem imposed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently con-

fronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly to provide for.

"The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off-season, who may be on duty twenty-four hours a day but ordinarily 'has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits.' Exclusion of all such hours the administrator thinks may be justified. In general, the answer depends 'upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work.' 'Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer * * *.'

"The facts of this case do not fall within any of the specific examples given, but the conclusion of the administrator, as expressed in the brief *amicus curiae,* is that the general tests which he has suggested pointed to the exclusion of sleeping and eating time of these employees from the work-week and the inclusion of all other on-call time, although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy

> the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so."

The petitioners have placed great stress on *Armour v. Wantock, supra,* and *Skidmore v. Swift, supra.* Both cases are readily distinguishable from the instant case. In the *Armour* case the employees were hired to stand and wait. They were required to stay on duty. They remained on call. They were required to stay in the fire hall. They did some work. To some extent they were amenable to the employer's discipline at all times (p. 122). "They were not, however, at liberty to leave the premises except that by permission of the watchmen, they might go to a nearby restaurant for their evening meal." Contrast these facts with the present case where the employees were not on duty, not subject to call, not amenable to the employer in any way. See Record, page 369, folio 2.

In the *Armour* case the trial court found as a fact that the time so spent (excluding sleeping and eating time) was time worked. This was affirmed (C. C. A. 7) 140 F. (2d) 356, and the Supreme Court said:

> "Both courts below having concurred in finding that under the circumstances and the arrangements between the parties the time so spent was working time, we therefore affirm."

None of the factors in the *Armour* case are present in this case, and the trial court found as a fact that the time spent in the fire hall was time worked, directly contrary to the situation in this case.

Also note the effect given by this Court to the "circumstances and arrangement between the parties" as to whether it was time worked or not.

In the present case the circumstances and arrangement, that is the complete history of the negotiations, the schedules set up to control working time, the notices, the agreements, and all other facts must be taken into consideration. They were all considered by the trial court below which is the exclusive judge of such circumstances and arrangements as they relate to the facts, and it found the time so spent was "not time worked."

In the *Skidmore* case the situation is a little different, but substantially the same. The employees agreed to remain in the fire hall and stay in it or within call. The trial court did not make a finding of fact, but held as a matter of law that the time so spent did not constitute time worked, but as a conclusion of law held that the time plaintiffs spent in the fire hall subject to call did not constitute hours worked as interpreted by the administrator of the Fair Labor Standards Act. Therefore, the upper Court had no finding of fact as to what was time worked to review as in the present case.

The lower court in its conclusions of law attempted to interpret the administrator's interpretive bulletin and, in doing so, held that time waiting could not be time worked. This, of course, was error because as the Supreme Court said, "* * * its (District Court) evaluation and inquiry were apparently restricted by its notion that waiting time may not be time worked." This Court said on this subject:

> "Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 572, 87 L. Ed.

460, 468, 63 S. Ct. 332. This involves scrutiny and construction of the agreement between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time and all of the surrounding circumstances."

This Court also has said that reasonable provision of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible will be considered. *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, supra.*

Here the trial court has carefully weighed the evidence and has made specific findings of all the facts with reference to time worked and the intermediate facts supporting the general finding.

We submit that upon the *Armour* and *Skidmore* cases this Court would necessarily have to deny petitioners' application for writs of certiorari.

CONCLUSION

1. There is no Federal question presented.
2. The issue presented is one of fact, which has been found in favor of respondents.
3. An appraisal of the practical construction of the agreements by conduct shows that the employees were paid for all time worked for:
   (1) The terms of the Union Contract were known to all appellants.
   (2) They were usually able to perform their work in the hours available for,
      a. The contract schedule was based on past experience and arrived at by negotiations

over a long period by both parties and by a Union diligent in its efforts for its members.

(3) If employees could not perform in one bracket, they were stepped up to the next so they would be sure to have enough hours to do their work.
   a. Old cooks with many years' experience testified the time allowed was ample.

(4) If not stepped up, they were paid for additional hours.

The appraisal also shows that employees had time off which did not have the "indicia of working time."

(1) Cooks had time off each day for,

   a. They had ample time in which to do their work.

   b. It was the custom and practice.

   c. Pursuant to the custom they took time off.

(2) Time off was absolutely free time.

   a. They rested, slept, loafed, left camp, went fishing, hunting and to taverns.

   b. They were not required to be on duty when they had time off for,

      (a) They could do what they pleased;

      (b) They could leave camp, etc. (see 2-a above);

      (c) They were not subject to rebuke or criticism if not available.

The employees' conduct showed that they did not consider the "off time" as time worked for,

(1) They made out their own weekly time cards on an hourly basis and certified the time set forth was correct.

(2) They had a grievance procedure in the Union Contract which provided for compulsory arbitration, but not a single grievance was ever filed, claiming additional hours (Court's Memo, R2, p. 374).

(3) The employees made no demands for additional pay even though they had knowledge of the fact that they would be entitled to pay for hours worked over the schedule.

The trial court said in its memorandum:

"The plaintiffs were members of a strong, active union that has shown diligence and courage in fighting for the rights of its members. They did not fear criticism or loss of jobs if they made a claim for extra time. The plaintiffs knew they were entitled to pay for all hours worked."

Respectfully submitted,

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